IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No.

FREDDIE RICH,

Petitioner,

—against—

EULA MARLENE RICH,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below.

The opinion of the Circuit Court of Appeals may be found in the appendix hereof, and, is reported at 134 Fed. (2d) 779.

The opinion of the District Judge may be found in the printed transcript of the record used in the Circuit Court, at pages 144-148.

The opinion and findings of the Referee may be found in the printed transcript of the record used in the Circuit Court, at pages 18-22.

Jurisdiction.

A statement as to jurisdiction appears in the petition pages 4-5 above.

Statement of the Case.

A summary statement of the facts involved is given in the petition pages 1-4 above.

POINT I.

The Circuit Court and the District Judge erred in setting aside the discharge in bankruptcy granted to the petitioner by the Referee in the exercise of the exclusive jurisdiction vested in the Referee under the Bankruptcy Act as amended in 1938.

By act of Congress of June 22, 1938, substantial and radical changes were made in the Bankruptcy Act. This petition for certiorari requires consideration and construction of the amendments dealing with discharge in bankruptcy and the Referee's powers and functions in connection therewith.

Prior to the amendments, whether to grant or deny a discharge was a function primarily and exclusively within the jurisdiction of the District Judge. The 1938 amendments transferred that jurisdiction, function and primary duty to the Referee.

Formerly, Section 1(7) of the Bankruptcy Act defined "Court" as "the court of bankruptcy in which the proceedings are pending, and may include the referee". The amended act redefined Court as follows:

> "Sect. 1(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; * * *"

The change is to make clear that generally and not in special instances the functions of the bankruptcy court may be exercised by the Referee. (Report of the House Committee on Judiciary July 29, 1937 page 5.) The Referee is no longer a master acting merely in an advisory capacity to the District Judge.

The former Section 14(a) of the Bankruptcy Act required the bankrupt to "file an application for a discharge in the

Court of Bankruptcy * * *" Under the amended Section 14(a) "The adjudication * * * shall operate as an application for a discharge:"

The former Section 14(b) of the Bankruptcy Act provided "The judge shall hear the application for a discharge and such proofs and pleas * * * in opposition thereto * * *" The amended Section 14(b) provides that "the court shall hear such proofs and pleas * * * in opposition to the discharge * * *" In making the change from the "judge" to the "court" (as redefined by Section 1(9)), Congress clearly intended that the Referee, instead of the judge, shall hear and determine the bankrupt's application for a discharge.

Section 38 of the Bankruptcy Act as amended in 1938 with the addition of clause 4 (11 U. S. C. A. 66) is unequivocal. It expressly provides:

> "Referees are hereby vested, subject always to a review by the judge, with jurisdiction to * * * (4) grant, deny, or revoke discharge; * * *"

This is a new jurisdiction for the Referee. At paragraph 5108, C. C. H. Bankruptcy Law Service says of this change:

> "It does away with the hearing of these matters by the referees on reference to them as special masters and their report back to the judge. Having not only an opportunity to hear, but to also observe the witnesses, the referees are better able to determine the issues than the judges who have only information given them by the referee. This should expedite proceedings and save expense. Report of the House of Committee on the Judiciary, June 29, 1937, page 10."

Prior to the addition of Clause 4 to Section 38, the Referee's findings were advisory and subject to Bankruptcy General Order 47 and Rule 53 (e) (2) of the Rules of Civil

Procedure. As a result of the addition of Clause 4, the referee no longer makes an advisory report, he disposes of the application, either by granting or denying a discharge; the District Judge has been relieved of the exercise of an independent judgment to grant or deny discharge. C. C. H. describes this amendment as "Elimination of Circumlocution".

The amendment of Section 38 by the addition of Clause 4 investing the Referee with the power to grant or deny a discharge, theretofore exercised by the District Judge, expressly limited the jurisdiction of the District Judge and the Circuit Court to that of "a review", such as exercised by an Appellate Court.

Had Congress intended that the District Judge and the Circuit Court were to be free from the strictures commonly applicable to review of disputed questions of fact, and to authorize those Courts to consider *de novo* petitioner's application for discharge, as in the case at bar, Congress would have said so; it did not. Compare *U. S. ex rel. TVA* v. *Powelson,* U. S. Sup. Ct. Law Ed. Advance Opinion Vol. 87, No. 15, pages 976, 980, not officially reported. Congress "invested" the "Referees", "subject always to a review by the judge, with jurisdiction to * * * (4) grant, deny or revoke discharge". (11 U. S. C. A. 66.) "The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction limited, concurrent or exclusive". (*Lockerty* v. *Phillips,* U. S. Sup. Ct. Law Ed. Advance Opinion Vol. 87, No. 15, p. 958, at 961.)

"The record may be such as to sustain either a negative or positive finding * * * The judicial function is exhausted where there is found a rational basis for the conclusions * * * after a fair and adequate hearing". In this language, Mr. Justice Rutledge, then a Circuit Judge, described the function of a reviewing Court in *American Gas* v. *Securities & Exchange Commission,* 134 Fed. (2d) 633 at 641.

The instant Referee heard the testimony. He observed the witnesses. Neither the Circuit Court nor the District Judge had those opportunities. The Referee was therefore in a superior position to rationalize upon the facts.

There was substantial evidence to support the Referee's conclusion favorable to petitioner. That conclusion is an inference of fact which may not be set aside upon judicial review because the Court would have drawn a different inference (*National Labor Rel. Bd.* v. *Southern Bell T & T Co.*, decided by this Court May 3, 1943. Law Ed. Adv. Opin. Vol. 87, p. 884). The Referee's reasons for his conclusion are contained in his opinion (R. 18-22). This constitutes his findings of fact. *Institutional Investors* v. *Chicago,* decided by this Court L. Ed. Adv. Opin. Vol. 87, p. 687.

Under applicable principles governing scope "to a review" the Referee's findings and conclusions, here supported by substantial evidence, are conclusive on the District Judge and on the Circuit Court. (*Virginia Electric & Power Co.* v. *National Relations Labor Board,* decided by this Court on June 7, 1943 (Law Ed. Advance Opinion Vol. 87, p. 1135).)

The error of the Courts below is bottomed on their incorrect conclusion that with the District Judge rests the primary duty to grant or deny a discharge.

That the Circuit Court, at bar, did not consider or give effect to the 1938 amendments to the Bankruptcy Act, is clear from its statement:

> "That the District Court had the power to reverse the decision of the Referee on the evidence cannot be doubted. In re Kearney 2 Cir. 116 F. (2) 899; In re Michel 2 Cir. 56 F. (2) 15."

In the *Kearney* case, Circuit Judge Clark, in his dissent, said (116 Fed. (2nd) at 900):

> "Bankruptcy General Order 47, 11 U. S. C. A. following section 53, provides—as does Federal Rule 53 (e) (2), 28 U. S. C. A. following Section 723c—that the judge 'shall' accept the findings of fact of a referee or master 'unless clearly erroneous.' These rules are not rendered inapplicable by the failure of the trial court to heed their mandate. In re Connecticut Co., 2 Cir., 107 F. 2d 734. * * * "

Quite apart from the 1938 amendment of the Bankruptcy Act, Bankruptcy General Order 47 and Rule 53 (e) (2) of the Rules of Civil Procedure require that the Circuit Court and the District Judge shall accept the findings of fact of a Referee "unless clearly erroneous".

Neither of the lower Courts found either, that the Referee's findings were "clearly erroneous" (compare *Goldstein* v. *Polakoff,* 135 Fed. (2) 45), or, that the surrounding circumstances contradict the testimony of petitioner as *In re Michel,* 56 Fed. (2d) 15 cited by the Circuit Court and decided prior to the 1938 amendment of the Bankruptcy Act.

The Circuit Court said that it had before it "the same question to determine here" as it had decided in *Morris Plan Industrial Bank* v. *Henderson,* 131 Fed. (2d) 975. There, it reversed an order of the District Judge setting aside a bankruptcy discharge allowed by the Referee, and said at page 977:

> "* * * we have again and again held that except in plain cases he (the District Judge) should accept the Referee's findings * * *
>
> That being true, we cannot see any adequate reason for refusing to accept the Referee's findings upon the first objection."

"There has been a growing tendency in the direction of liberality in favor of a bankrupt's discharge, and it has come to be recognized that the provisions of the law relating to discharge are not to be construed against a bankrupt, and if his discharge is to be denied it must be because there has been strict proof of the existence of some one of the bars which the statute has set up against the discharge." (*In re Grath*, 36 Fed. 41-42 C. C. A. 7th.)

The Circuit Court and the District Judge erred in setting aside the discharge granted to petitioner by the Referee.

POINT II.

The petitioner kept and produced before the Referee such books of accounts and records as would show his professional transactions of a business nature and his financial condition from such transactions to the extent required by Section 14(c) (2) of the Bankruptcy Act. The Courts below erred in holding otherwise.

Baily v. *Ballance*, 4 Cir. 123 Fed. (2d) 352;
Hedges v. *Bushnell*, 10 Cir. 106 Fed. (2d) 979, 982;
Anderson v. *Haddonfield National Bank*, 3 Cir. 94 Fed. (2d) 721;
International Shoe Co. v. *Lewine*, 5 Cir. 68 Fed. (2d) 517.

The Second Circuit affirmance at bar, is in conflict with the other Circuits.

The rule is clearly stated in the *Hedges* v. *Bushnell* case, *supra*, as follows at page 982:

> "Here the bankrupt kept and preserved some records * * * But the Statute does not exact or concern itself with any particular form of books or records. An impeccable system of bookkeeping which would meet

> with the approval of a skilled accountant or records so complete that they would satisfy an expert in business is not required as a prerequisite to discharge. * * * Taking into consideration * * * the kind and extent of business operated, and the absence of evidence satisfactorily showing bad faith, we think the failure to keep books of account and the failure to keep more complete and detailed records was satisfactorily explained".

The Referee found that petitioner's books and records satisfied the statutory requirement (R. 20-21). For the reasons previously set forth, the Courts below were not free to reject the Referee's conclusion. The action of the Courts below in setting aside the discharge to petitioner is in contravention with the Congressional mandate which requires a discharge in Bankruptcy to petitioner under the circumstances herein set forth.

CONCLUSION

The petition for a writ of certiorari should be granted.

This case involves matter of importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed for in the foregoing petition.

Respectfully submitted,

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